IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 4:05-cv-00329-GKF-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE'S MOTION FOR RECONSIDERATION OF COURT'S OPINION AND ORDER (DKT. #1463)

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and respectfully moves for reconsideration of the Court's Order (Dkt # 1463) for reasons set forth below

I. Introduction

In its order of January 16, 2008 (DKT. #1463) ("the Order") the Court committed clear error (1) in holding that the state law of attorney client privilege applies to this federal question case, (2) in requiring the State to revise its privilege logs in such a fashion that they would disclose to Defendants "how disclosure [of documents for which attorney client privilege is claimed] will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest," and (3) in holding that Peterson Farms has established a "special need" for documents for which the State has claimed work product protection, while making neither provision for an individualized document by document showing of "substantial need" nor provision to protect against disclosure

of the mental impressions, conclusions, opinions, or legal theories of attorneys or other representatives of the State. The State therefore respectfully asks the Court to reconsider and revise its Order.

II. Legal Standard

Grounds justifying reconsideration include "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). "Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Id.*

III. Argument

A. The Court's "analytical solution" erroneously relies on the Open Records Act and departs from the overwhelming weight of authority

The State respectfully submits that the Court erred in its analytical solution based, at least in part, on the provisions of the Oklahoma Open Records Act. Order at p. 3. The first step required by the Tenth Circuit in federal question cases with pendant state claims, is an "analytical solution" based on privilege law. That court stated:

> If such a conflict on the privilege exists, then an analytical solution must be worked out to accommodate the conflicting policies embodied in the state and federal privilege law.

Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1368-69 (10th Cir. 1997). The Court, reversing its apparent position at oral argument, Tr. 49 ("Well, I understand the Open Records Act expresses a policy but does it really change the law of attorney-client privilege as it's going to be applied in this case or is it just sort of policy?"), based its analytical solution, not on privilege law alone, but on the provisions of the Oklahoma Open Records Act, 51 Okla.Stat. § 24A.1, *et. seq.* Order at p. 3. The Open Records Act is not a law of privilege, but does recognize and

enforce the applicability of laws of privilege in open record requests. To import some notion of privilege law from the Open Records Act not only contravenes the pronouncement of the Tenth Circuit that an analytical solution must be based on privilege law and thus misapprehends controlling law, but also is analytically backwards.

Additionally, the Court's analytical solution is entirely without support in case precedent. No case cited by Peterson Farms, by the State, or appearing in the Court's Order supports supplanting the federal common law of privilege in favor of state privilege law in a federal question case also raising pendant state claims. Indeed, immediately following the language in *Sprague v. Thorn Americas, Inc*., cited above, appears footnote 7 in which the Tenth Circuit summarizes law from other circuits in similar situations, and in which every case cited applied federal, rather than state privilege law. The State respectfully suggests that this Court's departure from the overwhelming weight of authority would constitute a departure from the "light of reason and experience" which is the foundation of Federal Rule of Evidence 501 and therefore is clearly erroneous.

The Court's departure from the weight of authority applying the federal common law of privilege in similar cases will create ongoing problems in the prosecution of this case going far beyond the privilege logs which are the subject of Peterson Farms' motion and will impose upon the State a manifest injustice. The Court will become embroiled in reviewing assertions of attorney-client privilege which come up on an ongoing basis in this case. State representative deponents have already begun to be improperly questioned in depositions about their communications with counsel. *See, e.g.,* deposition of Professor Hailin Zhang, Tr. 11:2 - 12:15 Exhibit 1 hereto.

Indeed, courts long have viewed the attorney client privilege's central concern as one "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97 (3d Cir. 1992), relying upon *Upjohn v. United States*, 449 US 383, 389 (1981). Thus, the confidentiality of communications between an attorney and the client is protected precisely because it promotes "broader public interests in the observance of law and administration of justice." Knowledge that communications between counsel and representatives of the client (the State) may be subject to the Court's review will inevitably chill those communications and will, equally inevitably, seriously impair the very public interest in the observance of law and administration of justice which is the purpose of the attorney client privilege.

Further, given the propensity of the Defendants to file dilatory motions to stall the progress of this case, it is certain the Court will be required to review, and the State to defend, the importance of communications between attorneys and representatives of the State to determine whether disclosure will impair the public interest. Such communications are universally privileged under the federal common law of privilege. The State should not be disadvantaged by the chill on communications with its counsel and the burden of justifying the importance of those communications to the public interest, and the Court should not be burdened with the inevitable task of adjudicating that importance.

Additionally, the Court's Order misapprehends the controlling law that once the attorney client privilege attaches, its protection is permanent. "Materials subject to the attorney client privilege are permanently protected from disclosure by himself or by the legal advisor, except when the protection is waived." *Lewis v. Unum Corporation Severance Plan*, 203 F.R.D. 615,

618 (D. Kan. 2001). When communications are made during the existence of an attorney-client relationship, the privilege continues to protect them from disclosure even after that relationship has been terminated. *Chandler v. Denton*, 741 P.2d 855, 865 (Okla. 1987). Thus, even if state privilege law applies in this federal question case -- a proposition the State contests -- once the privilege attaches, it remains permanently, even after the termination of the once-pending investigation, claim, or action. Thus, the State should not be required to disclose, even under state law, any document for which privilege has ever attached.

The State incorporates the arguments and authorities set out in its response to Peterson Farms' Motion to Compel (DKT. #1327) and respectfully asks the Court to reconsider and reverse its determination that state privilege law applies in this federal question case. Upon such reversal, and application of the federal common law of privileges in this case, no revision of the State's privilege log to support a finding of harm to the public interest would be required.

B. In the event the Court maintains its determination that state privilege law applies, the revised privilege logs should be submitted *in camera*

Without receding from its view that the Court erred as a matter of law in holding that state privilege law applies to this federal question case, the State respectfully submits that the requirement of the Court's Order, which calls for the State to "state how disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest" on a privilege log to be given to Peterson Farms, is clearly erroneous. Instead, the revised privilege log should be submitted to the Court *in camera.*

A privilege log which tends to disclose the information to be protected by privilege should not be required. *See* Fed. R. Civ. P. 26(b)(5)(A) ("When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as

trial-preparation material, the party must: . . . (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim (Emphasis added). The Court's Order places an impossible burden upon the State. On the one hand, if the description of the document is sufficient to explain the harm done by its disclosure, it will necessarily reveal something of the information sought to be protected. On the other hand, if the State uses some generic description of the harm to the public interest by disclosure, it will likely be asserted that the description is not sufficiently informative to allow assessment of the privilege claim. In the event the Court maintains its (erroneous) determination that state privilege law applies, at a minimum the State should be allowed to submit its revised logs *in camera* where the Court can make a determination of potential harm to the public interest. This would comport with the requirements of 12 Okla. Stat. § 2502(D)(7), which imposes upon the court the duty to determine if "disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest." The Oklahoma statute has no provision for making that determination in an open, adversary proceeding. *In camera* production of the revised privilege log satisfies the requirements of both the Oklahoma statute and Fed. R. Civ. P. 26(b)(5)(A).

The State therefore respectfully asks the Court to reconsider this provision of its Order.

C. The Court should reconsider its Order stripping all of the State's work product claims

The Court held that "[a]s to documents which have not been produced under a claim of work product" Peterson Farms has established a "special need" and that those documents are not available from any other source. Order at 4. By its terms, this Order strips the work product protection, not from some discrete set of documents, but from all documents on the log for which

the State has asserted a claim of work product protection. Thus, it sweeps away both opinion and fact work product alike upon an erroneous finding that Peterson Farms has demonstrated "a special need." The State respectfully submits that this holding is both factually unfounded with respect to the alleged demonstration of "special need," and, in any event, employs the incorrect legal standard with respect to the State's opinion work product. Even assuming the Court intended to limit its Order to those work product claims challenged by Peterson Farms in its Exhibit 11 without expressly saying so, Peterson Farms has failed to make the required showings of substantial need and absence of any substantial equivalent source of the desired information as is required by Fed. R. Civ. P. 26(b)(3).

1. Peterson has not established a "special need" for all of the State's fact work product.

Rule 26(b)(3) provides that work product material is subject to discovery:

> …only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Peterson Farms did not seriously attempt to make such a showing, nor could it. Peterson Farms presented no affidavit establishing the elements required to gain access to the State's fact work product. Peterson Farms simply has not articulated any "substantial need" to invade that protected fact work product. A conclusory and *pro forma* objection to a work product claim is not sufficient to establish a "substantial need" or "undue hardship." *Chaikin v. VV Publishing Corp.* 1994 WL 652492, * 2 (S.D.N.Y. 1994).

Further, if "substantial need" were demonstrated so easily, the State certainly has an equivalent substantial need for the fact work product of Peterson Farms and the other Defendants. After all, the fact work product of defense counsel, appearing in the files of

Peterson Farms, undoubtedly discloses the corporate knowledge of Peterson Farms about environmental hazards from its operations, relevant data about its operations, and potential liability for its activities. This data and information is no more readily available elsewhere than are the contents of the State's fact work product, so, by operation of the "Goose and Gander" principle under the standard being applied by the Court, the State has no substantial equivalent without undue hardship. The State does not believe fact work product may be so casually invaded, but insists that if its fact work product were to be available on such a conclusory showing, so must be the fact work product of all of the Defendants. Therefore, the State respectfully asks the Court to reconsider Peterson Farms' claims and to determine whether or not a conclusory showing of "substantial need" and no "substantial equivalent" without "undue hardship" shall be the universal rule to be applied in this case. The State submits that such a conclusory assertion as that made by Peterson Farms is, as a matter of law, an insufficient showing to invade the protections afforded fact work product.

For example, Peterson Farms claims a "substantial need" for information about Sequoyah Fuels Corporation (SFC), and its polluted site at the lowest end of the IRW, without even articulating what the "substantial need" for those documents is. Peterson Farms has wholly failed to articulate either the relevance of these documents, or its "substantial need" for them, especially in light of the dozens of boxes of SFC related documents which the State has produced and Peterson Farms' counsel has inspected. The pollution of the SFC site is of a different type than the nutrients and bacteria contributed by poultry waste, and could not have contributed to the pollution of the Illinois River, its tributaries, or Lake Tenkiller without repealing the law of gravity and traveling upstream. Beyond a bald assertion that it wants the State's work product, Peterson Farms gives no explanation whatsoever why this information is important to its

defenses. Where such requested documentation is irrelevant, there can be no "substantial need" for it. Moreover, Peterson Farms has also had the "substantial equivalent" of the withheld documents in the form of this production, and the State has only withheld its work product, not the underlying facts about the history of the SFC plant. Despite the absence of any individualized, substantive showing for this information, as required by Fed. R. Civ. P. 26(b)(3), the Court erroneously ruled this information discoverable.

Peterson Farms also makes conclusory statements of need for work product dealing with the city of Watts sewage lagoon or the gravel mining operations of Jock Worley in 1998 and 1999. Brief at 22. Peterson Farms explains neither why it has a "substantial need" for such work product, nor why it should get such documents while itself resisting any discovery going back more than five years. Until that "five year rule" is set aside, the "Goose and Gander" principle protects the State from discovery requests going back so far. Even assuming there were no flat "five year rule" currently in place, Peterson Farms has the burden of establishing not merely a want or a need, but must establish a "substantial need," to invade the State's work product on a document by document basis, and that there is no "substantial equivalent" of the information otherwise available to it. Given the breadth of the non-protected documents available to it, Peterson has the substantial equivalent of the requested information. Again, despite the absence of any individualized, substantive showing for this information, as required by Fed. R. Civ. P. 26(b)(3), the Court erroneously ruled this information discoverable.

By its terms, the Court's Order confuses the protected documents of the State with the "substantial equivalent" of the information contained in those documents. Even if Petersons Farms did have a substantial need for the challenged work product -- which it has not established -- the information sought from those documents is available to Petersons Farms through other

discovery methods, such as interrogatories and depositions of knowledgeable witnesses who may be identified from the privilege logs. Thus, no invasion of the State's work product is justified. *Jinks-Unstead v. England,* 232 F.R.D. 142, 147 (D.D.C. 2005). This burden is no greater than that normally found in litigation in which fact witnesses are located and deposed.

2. The Court has not protected the mental impressions, conclusions, opinions or legal theories of the State's attorneys or other representatives

Significantly, even Peterson Farms recognizes that the courts distinguish between "ordinary" work product, which consists of "raw factual information," and "opinion work product," which consists of thoughts and mental impressions of attorneys, Brief at 20, citing *Frontier Refining, Inc. v. Gorman-Rupp, Inc.*, 136 F.3d 695, 704 n. 12 (10th Cir. 1998), while making no attempt to justify invading the State's opinion work product. As the Court reviews the State's privilege logs, it will notice that they include a great many claims of work product protection in the form of memoranda or correspondence between the State's lawyers and client representatives. Indeed, many of the challenged documents bear a claim of attorney client privilege as well as work product protection. Obviously, such documents contain the mental impressions, opinions, conclusions, and legal theories of the State's counsel.

By its terms, Rule 26(b)(3) requires, even when the required showing of substantial need and no substantial equivalent without undue hardship has been made, that the Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. As this Court has recognized, opinion work product is afforded greater protection than fact work product, and, while the Supreme Court and the Tenth Circuit have not decided if such opinion work product is absolutely protected, at least some circuits have found it to be entitled to absolute protection. *Cardtoons v. Major League Baseball,* 199 F.R.D. 667, 684-85 (N.D. Okla. 2001). Those courts

permitting discovery of opinion work product have all indicated that mere inability to obtain information without undue hardship is insufficient to compel disclosure of opinion work product. *Id.* 199 F.R.D. at 685, relying upon *Frontier Refining, Inc. v. Gorman Rupp Co.*, 136 F.3d 695, 704 n. 12 (10th Cir. 1998).

Nevertheless, this is precisely what the Court did in its Order. The Court has made no provision to protect the opinion work product of the State or its representatives in circumstances under which the presence of opinion work product is obvious. Instead, the Court stopped its Order with the (incorrect) finding that Peterson Farms had demonstrated both a special need and that the documents are not available from any other source. By stopping at that point, the Court's Order leaves the State's opinion work product entirely unprotected. The Court should reconsider its Order and provide the required protection for the mental impressions, conclusions, opinions, or legal theories of State's counsel or the State's other representatives. The failure to do so constitutes clear error.

IV. Conclusion

For the foregoing reasons, the State respectfully asks the Court to reconsider its Order and, upon reconsideration, hold that the federal common law of privilege applies to this federal question case, that no revision of its privilege logs is therefore required, and that to demonstrate an entitlement to receive the documents for which the State has claimed fact work product, Peterson Farms must make an individualized showing for each document of "substantial need" and no "substantial equivalent" without "undue hardship." In the unlikely event Peterson Farms is able to meet its burden, the Court should examine *in camera* each of the documents for which such a showing is made, and determine how to protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of the State's attorneys or other

representatives concerning its litigation.

Respectfully Submitted,

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